Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS,
Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

The Government's brief overlooks the facts as stated both in the complaint and in the opinion of the Court below.

The complaint alleges inter alia:

"That it was the duty of this defendant * * * to annually ascertain and apportion any divisible surplus on the policy" (Comp. par. 13, R. 5).

"That * * * on the 31st day of March, 1947, the * * * certificate carried both an individual reserve and a general reserve and unearned premiums and a divisible surplus" (Comp. par. 14, R. 5), and that the defendant breached or defaulted as to the duty alleged in paragraph "13" by failing " * * * to declare or pay the insured any of the aforesaid reserve, unearned premiums and/or dividends or divisible surplus" (Comp. par. 15, R. 5), " * * * with the result that on March 31, 1947, the policyholder was entitled to a considerable reserve and/or divisible surplus and unearned premiums" (Comp. par. 18, R. 6). "That the

moneys paid by the veteran for insurance if applied at the net rates agreed upon by this defendant * * * the unearned premiums, reserve and divisible surplus on March 31, 1947, was more than sufficient to pay for insurance on the face amount of the certificate for a period subsequent to the 27th day of August, 1948, * * *" (Comp. par. 20, R. 6, 7).

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 115

ADELE WEISS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR AN ORDER VACATING THE JUDGMENT DISMISSING PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND THAT DEFENDANT'S BRIEF NOW SHOWS THAT THERE IS A QUESTION OF FACT

SIDNEY MORSE,
Counsel for Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 115

ADELE WEISS,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for a writ of certiorari in this case, entered on October 8, 1951. Rehearing is sought at this time because, as pointed out more fully in the annexed petition, the Government in its brief has shown conclusively that there is a question of fact involved, and for that reason the order of the District Court dismissing the complaint for failure to state a cause of action should be vacated and the motion be denied.

SIDNEY MORSE,
Counsel for Petitioner.

October 15, 1951.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR AN ORDER VACATING THE JUDGMENT DISMISSING PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND THAT DEFENDANT'S BRIEF NOW SHOWS THAT THERE IS A QUESTION OF FACT

Petitioner prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed June 13, 1951, and for an order vacating the judgment of the District Court dismissing petitioner's complaint for failure to state a cause of action.

Reasons for Granting a Rehearing, Issuing the Writ and Vacating the Judgment Dismissing the Complaint:

The Government, in its brief at page 9, stated:

> "* * * His policies, therefore, had no reserve which could then have been used to buy extended term insurance. * * *"

Petitioner shall now show that the Court below held that there was a reserve in the policy; Sec. 602f of the National Service Life Insurance Act as it was during the life of the veteran provided that these certificates carried a reserve, and the facts of the case conclusively show that there was a reserve in the policies.

The Court below stated in its opinion (R. 42):

> "* * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums or undeclared dividends sufficient and effective for the purpose * * *."

At page 44, the Court below stated further:

> "* * * No dividends were, however, declared for many years. Indeed this delay in the declaration of

> dividends is made one of the grounds of complaint by the plaintiff. It was explained by defendant on the ground that for the duration of the war the government's liability could not be accurately determined and thereafter it was placed in doubt by the decision in Zazove v. United States, 7 Cir., 162 F. 2d 443, which threatened to enlarge it 'by billions' until reversal on June 14, 1948 in United States v. Zazove, 334 U. S. 602. * * * "

The foregoing explains why the defendant took the entire gross surplus and placed it aside as a reserve to pay for any liability that may arise in the event the Zazove case was affirmed. When the Zazove case was reversed by this Court it was therefore unnecessary for the defendant to retain this reserve, and therefore released it and declared the first dividend on May 28, 1949, after the present action had been commenced (R. 1).

As the foregoing reserve was created from unearned premiums, those veterans who allowed their policies to lapse had an interest in this reserve proportionate to the premiums they paid towards the creation of the reserve. This interest continued from the date of lapse until the Administrator released the reserve for the declaration of dividends. The foregoing veterans, having died before dividends were declared, the rights of the parties became fixed and vested. The Government, having accepted these premiums for insurance equal to the face value of the policy, was therefore obligated by contract to give the beneficiaries of the foregoing policies insurance equal to the face value of the policy for such period as the reserve of the policy on the date of lapse would purchase.

The Court below further stated in its opinion (R. 44, 45, fol. 45):

> " * * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not

having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * * "

At R. 45, fol. 46 the Court below stated:

" * * * there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. * * * "

At page 46, the Court below stated:

" * * * for the bearing of the cost of the United States beyond the *amount of reserve of the policy.*" (Emphasis supplied.)

Thus it has been shown that the Court below held that these policies carried a reserve. Sec. 602(f) of the National Service Life Insurance Act as it was at the time this question arose also provided that these certificates carried a reserve.[1]

It is urgently stressed upon this Court that the regulations relied on by the Court below (R. 44,[2] fol. 45 and R. 44 in the footnote of the opinion [3]) distinctly stated: " * * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * * ".

It has therefore been shown that there is a question of fact. The beneficiaries of those veterans whose lives were shortened due to service to their country should therefore be entitled to their day in Court so that they may prove the facts of their claim.

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[1] Appendix of petition, page 10.

[2] Appendix of petition pages 11, 12.

[3] Appendix of petition page 12.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit, and for an order vacating the judgment of the District Court dismissing petitioner's complaint for failure to state a cause of action.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

SIDNEY MORSE,
Counsel for Petitioner.